to defectives nothing is accomplished by subjecting those who are confined to a state institution to such an operation. Even as applied to criminals (transmissibility of criminality being conceded), the beneficial result would be negligible. This fact is pointedly illustrated by Mr. Charles A. BOSTON in an excellent article, "A Protest Against Laws Authorizing the Sterilization of Criminals and Imbeciles," 4 JOUR. CRIM. LAW AND CRIMINOLOGY 326.

If it be admitted that such legislation is constitutional what is to prevent the legislature from enacting that other classes be sterilized in order to prevent the transmission of mental conditions possessed by those classes and deemed undesirable for the public good? Then too is such legislation in keeping with the spirit of the Bill of Rights found in our Constitutions. In view of the crude form of many of the statutes, using terms as yet undefined to classify persons, and providing little or no protection for the unfortunates selected as subjects, would it not be better for our law-making bodies to proceed more cautiously and conservatively in this field of legislation?

G. E. K.

THE EFFECT OF A MINIMUM WAGE ORDINANCE UPON SPECIAL ASSESSMENTS.—May a city, in making improvements and levying special assessments to pay therefor, pass a minimum wage ordinance whose effect is to charge the property owners twenty-five per cent more for labor performed than they would have had to pay had they contracted for the same work in their own behalf? The practical importance of this question is evidenced by a very recent Washington case, *Malette* v. *City of Spokane* (1914), 137 Pac. 496. The facts were these: The city of Spokane passed an ordinance prescribing a minimum rate of $2.75 for a day's common labor of eight hours on all city work. This rate was about twenty-five per cent higher than the current rate paid for similar labor by private persons. Later, the city provided for the improvement of a certain street along which appellant owned property, which improvement was to be paid for by special assessments against the property benefited. Appellant contended that since the cost of the work was not to be borne by the city, but by the property owners, the city, in respect of this improvement, acted merely as agent of the property owner, and was bound to do his work to the best advantage; that such work could not be done to the best advantage under the minimum wage ordinance, which empirically fixed a wage and compelled its payment by an independent contractor, thereby increasing the cost of the work; that the same violated the trust relation between agent and principal and was therefore void. *Held,* by a divided court, that the ordinance was valid.

In reaching its decision, which a dissenting judge denominated "judicial legislation, which is judicial tyranny," the court completely departed from the position it took when the case had its first hearing more than a year ago. 68 Wash. 578, 123 Pac. 1005. The theory of the court at that time was this: that the city in improving a street at the cost of the benefited property owners acts not in a governmental, but in a proprietary capacity and as the agent of the owner. Two difficulties connect themselves with such a theory. First,

can it be broadly said that the function of the city in improving its streets is proprietary? "The opening, construction, and maintenance of public highways," says DOYLE, J., in a recent Oklahoma case, "is purely a governmental function whether done by the state directly, or by one of its municipalities for which the state is primarily responsible." *Byars* v. *State,* 2 Okla. Cr. 481, 102 Pac. 804. See also *State* v. *Lake Koen, etc. Co.,* 63 Kan. 394, 65 Pac. 681; *State* v. *Atkin,* 64 Kan. 174, 67 Pac. 519. It is true that in relation to the city's liability for injuries due to defective streets, the courts sometimes speak of the city as acting in a proprietary capacity. *Denver* v. *Dunsmore,* 7 Colo. 328, 3 Pac. 705. But even if it does so act and is so liable, it is not because of the way in which the particular street was paid for, that is, whether by special or general assessment. *Colwell* v. *Waterbury,* 74 Conn. 568, 51 Atl. 530; *Sutton* v. *Snohomish,* 11 Wash. 24, 48 Am. St. Rep. 847. Secondly, is the situation one that readily lends itself to the concept of agency? It would seem not, for the fundamentals of that relation are not present. The person specially assessed does not, as the true principal does, confer authority, for the special assessment is levied in the exercise of the taxing power. *Holley* v. *Orange Co.,* 106 Cal. 420, 39 Pac. 790. Indeed, the supposed agent's act may be, and frequently is, against the property owner's will. Nor is the work that of the property owner. Nor can he control or discharge the supposed agent. In the light of these considerations, it is evident that the agency idea is neither accurate nor useful, and the court's own disinclination in the principal case to adhere to it is not to be wondered at.

Cases involving statutes and ordinances prescribing the hours of labor, rate of wages, and kinds of laborers, where the funds out of which payment is made are general and not special assessments, are numerous and conflicting. On the one hand, such legislation has been condemned as improperly restricting competition, as in *Atlanta* v. *Stein,* 111 Ga. 789, 36 S. E. 932, where it was held that an ordinance providing that all city printing should bear the union label was illegal because it tended to encourage monopoly and defeat competition, even though the charter did not require contracts for public work to be let to the lowest bidder. And in *Street* v. *Varney,* 160 Ind. 338, 66 N. E. 895, though there was no specific constitutional provision prohibiting this kind of legislation, a statute enacting a minimum wage to be paid unskilled labor employed on any public work of the state or any municipality, was held invalid on the ground, *inter alia,* that "the power to confiscate the property of the citizens and tax payers of a county, city, or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the Legislature over municipal corporations, nor the legitimate use of such corporations as agents of the state." The principal case is the first one, apparently, touching the situation where the fund out of which payment is made is a special assessment on the benefited property holders, and where neither statute nor charter requires the contract for the improvement to be let to the lowest bidder. On principle it would seem that the circumstance of payment by a special, rather than general tax payer, ought not to vary the result. While the minimum wage measure may enhance the amount of the

special tax, it must also be remembered that the special tax payer gets a direct benefit from the improvement, while the general tax payer does not.

It is conceded to be a universal rule that the reasonableness of an ordinance passed under general, and not directory, powers may always be enquired into by the courts. *Northern Liberties Gas Co.*, 12 Pa. St. 318. What shall be the test of the reasonableness of the minimum wage ordinance? In the principal case the minority view was that an ordinance was unreasonable which called for any wage above the current rate. "Up to the present," said Judge GOSE, "it has never been held to my knowledge that a city may make a donation to a citizen under color of law and assess the bounty against the property of an objecting property owner." The view that any wage above the prevailing rate is unreasonable *per se* rests, it would seem, upon the assumption that the *prevailing* rate is reasonable. That it often is not, is an economic fact of common knowledge in these days of the high cost of living. That judicial notice may be taken of such facts has already been declared. *State* v. *Somerville*, 67 Wash. 638, 641, 122 Pac. 324, 326; *Muller* v. *Oregon*, 208 U. S. 412. On the other hand, it may be objected that if, in a case where the minimum wage is greater than the prevailing rate, the court is not bound to a presumption that the prevailing rate is reasonable, but may declare it unreasonable as inadequately reimbursing the laborer, then for the same reason the court would also have the power to declare invalid an ordinance providing that the minimum wage shall be the prevailing one. But there is obviously a difference between sustaining an ordinance as reasonable which prescribes a minimum rate in excess of the prevailing rate, and invalidating as unreasonable an ordinance providing that the minimum wage shall be the prevailing one; for the length to which the court goes in the latter case is much greater than in the former. Perhaps the most satisfactory answer to this theoretical objection is that it *is* theoretical. Such a contingency need cause little apprehension in a country whose courts are as conservative as their history shows ours to be. D. F. M.

CAN AFFIDAVITS OF JURORS TO SHOW MISCONDUCT BE ADMITTED FOR THE PURPOSE OF SETTING ASIDE A "QUOTIENT VERDICT?"—A recent Oklahoma case raises one phase of a question which has been perplexing the courts ever since jury trials were invented, and in regard to which there is a great contrariety of opinion. After a verdict had been rendered for the plaintiff in a personal injury suit, the defendant made a motion for a new trial on the ground of misconduct of the jury, and in support of his motion offered the affidavits of several of the jurors to the effect that the verdict was determined upon as the result of an agreement whereby each one of the jurors was to set down on paper the sum to which he thought the plaintiff entitled, the final verdict to consist of the amount obtained by dividing the sum of the respective amounts so set down by the number of jurors. The trial court refused to hear these affidavits and its ruling was sustained by the supreme court on the ground of public policy. *Tulsa Street Railway Co.* v. *Jacobson* (Okl. 1913), 136 Pac. 410.